Research Federal Credit Union *and* Local 876, United Food and Commercial Workers Union, AFL–CIO–CLC. Cases 7–CA–30659 and 7–RC–19248

March 25, 1999

SUPPLEMENTAL DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On January 8, 1993, the National Labor Relations Board issued a Decision and Order[1] in this proceeding adopting the judge's findings that the Respondent violated Section 8(a)(1), (2), and (5) of the National Labor Relations Act by soliciting, and promising to remedy, employee grievances, promising and announcing improved benefits, and by creating, assisting, and dominating an employee involvement committee. The Board further adopted the judge's findings that, as in *Camvac International*[2]—a similar 8(a)(1) and (2) case—a bargaining order was appropriate under *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969), because continuing effects of the Respondent's violations rendered slight the possibility of a fair rerun election. 310 NLRB at 65.[3]

On February 4, 1993, the Respondent filed a motion to reopen the record and for reconsideration of the Board's Decision and Order. The Respondent argued, among other things, that a bargaining order was inappropriate because there had been significant employee and managerial turnover since its unfair labor practices, that this turnover was not caused by or related to the Respondent's alleged unfair labor practices and objectionable conduct, and that the Respondent did not commit any additional unfair labor practices between 1990 and the Board's Order. On May 21, 1993, the Board rejected this motion in an unpublished order.

On June 8, 1993, the Respondent petitioned the District of Columbia Circuit Court of Appeals for review of the Board's Decision and Order. The Board cross-petitioned the court for enforcement. On May 10, 1994, during the pendency of the appeal, the Board requested that the court remand the Decision and Order to it for reconsideration[4] in light of the court's recent decisions in *Somerset Welding & Steel*[5] and *Avecor*.[6] In *Somerset Welding* and *Avecor*, the court had declined to enforce bargaining orders imposed by the Board in category II *Gissel* cases, and had instead remanded the cases to the Board to consider, among other things, the effect of employee turnover and management changes on the continued propriety of this remedy.

On June 1, 1994, the court granted the motion and remanded the case to the Board for further consideration in light of its decisions in *Somerset Welding* and *Avecor*. Thereafter, the Board solicited the positions of the parties on remand. In their responses, the General Counsel and the Charging Party Union argued that a bargaining order remained the appropriate remedy because events postdating the Respondent's unfair labor practices were irrelevant.[7] The Respondent conversely contended that a bargaining order was unwarranted because: (1) there had been substantial employee and managerial turnover in the 5 years that had elapsed since its adjudged unfair labor practices; (2) this turnover was not caused by its unlawful or objectionable conduct; and (3) there had been a substantial delay between the 1990 election and the Board's remand, which delay was not caused by the Respondent.

Subsequently, through a Notice to Show Cause, the Board verified the Respondent's claims that there had been substantial employee and managerial turnover. The Board confirmed that, at the time of the Respondent's unfair labor practices and the 1990 Board-conducted election, the Respondent employed about 49 bargaining unit employees.[8] By January 8, 1993, the bargaining unit had increased to 64 employees (62 as of July 25, 1994), and only 12 of the original 49 employees—19 percent—remained.

[1] 310 NLRB 56. No current Board member participated in this Decision.

[2] 288 NLRB 816 (1988). Subsequently, the Sixth Circuit Court of Appeals remanded *Camvac* to the Board to consider, among other things, whether turnover at the respondent's facility eliminated the need for a bargaining order. 877 F.2d 62 (6th Cir. 1989). On remand, the Board accepted the court's decision as the law of the case and vacated the bargaining order. 302 NLRB 652 (1991).

[3] In the underlying case, as in *Camvac*, the Board adopted the judge's finding that it was a "Category II" case under *Gissel*.

Under *Gissel*, Category I cases involve unfair labor practices so "outrageous" and "pervasive" that they cannot be erased by traditional remedies, thereby making a fair election impossible. Category II cases are marked by less pervasive unfair labor practices which "nonetheless still have the tendency to undermine majority strength and impede the election process." In the latter category, a bargaining order is appropriate where the Board finds that "the possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and that employee sentiment, once expressed through cards would, on balance, be better protected by a bargaining order. . . ." 395 U.S. at 613, 614–615.

[4] Specifically, the Board informed the court that "the Board—which now has a full complement of five members, following the recent appointment of three new members—would like to reconsider its decision and order in this case in light of the decisions of this court in *Somerset Welding* and *Avecor*." [Citations omitted.]

[5] *Somerset Welding & Steel v. NLRB*, 987 F.2d 777, 781 (D.C. Cir. 1993), denying enf. in part to 304 NLRB 32 (1991), and remanding for further consideration.

[6] *Avecor v. NLRB*, 931 NLRB 924, 937 (D.C. Cir. 1991), denying enf. in part to 296 NLRB 727 (1989), and remanding for further consideration.

[7] In its position statement, the Union acknowledged that the employee involvement committee, which was found to violate Sec. 8(a)(2) in the underlying proceeding, had been disestablished. According to the Respondent, it suspended operation of this committee in June 1990, before the issuance of the administrative law judge's decision.

[8] The bargaining order in the underlying case was supported by authorization cards signed by 30 of these 49 employees. 310 NLRB at 63.

In addition, the Notice to Show Cause verified that by July 1994,[9] additional substantial changes had occurred. Thus, only four of the supervisors employed in 1990 remained, and at least 76 percent of employees eligible to vote in the 1990 election were either no longer employed by this Respondent or were not in bargaining unit positions.

The Respondent further contends that additional turnover has occurred since the foregoing. The Respondent also argues that it has committed no unlawful conduct since 1990 and that it has disbanded the committee established in violation of Section 8(a)(2).

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Analysis

We have considered the original Decision and record, the positions of the parties on remand, and all of the relevant evidence. Based on the particular facts in this case, we have decided to modify the Board's original decision to delete the *Gissel* bargaining order and to direct a second election.[10]

Initially, we note that the Board traditionally assesses whether a *Gissel* bargaining order remedy is warranted as of the time of the respondent's unfair labor practices. Historically, the Board has not considered subsequent employee or managerial turnover in this context. *Highland Plastics, Inc*., 256 NLRB 146, 147 (1981).[11] In the particular circumstances of this case, however, we find that turnover need be considered. Thus, when the Board sought and obtained a remand from the court, it was specifically for the purpose of considering the impact on this case of the court's recent decisions in *Somerset Welding* and *Avecor*. Having done so, we are constrained to give substantial weight to the court's criteria in those cases—including turnover—when analyzing, on remand, the propriety of a bargaining order.

In *Somerset Welding* and *Avecor*, the court held that where, as here, unfair labor practices fall within category II in *Gissel*,[12] a bargaining order is warranted only where there is substantial evidence that: (1) the union, at some point, enjoyed majority support in the unit; (2) the respondent's unfair labor practices tend to undermine majority strength and impede the election process; and (3) the Board establishes that the possibility that traditional remedies—including a rerun election—will be effective, is slight. As to the third element, the court further held that the Board must give due deference to employees' Section 7 rights to choose whether to be represented and, when evaluating the need for a bargaining order, must carefully consider employee turnover and managerial changes occurring after the Board-conducted election, up until the time of the Board's order. *Avecor v. NLRB*, supra, 931 F.2d at 937–938.[13] As stated by the court, the Board must "explain convincingly why the turnover has not cleared the air of the unfair labor practices and why traditional remedies could not reasonably ensure a fair election." Id. at 939. See also *Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074 (D.C. Cir. 1996).

Here, as established through the Notice to Show Cause, there has been substantial employee and managerial turnover since the Respondent's unlawful conduct and the 1990 election. Between mid-1990 and July 1994**,** there has been at least a 76-percent turnover of unit employees and a 76.5-percent change in managerial personnel.[14]

Second, there is no evidence that the Respondent's violations—which consisted primarily of unlawfully promising and granting benefits to employees, and forming, dominating, and assisting an employee involvement committee in violation of Section 8(a)(2)—caused this substantial turnover. See *Camvac International*, 302 NLRB 652, 653 (1991).[15] Further, as in *Camvac*—where the Sixth Circuit refused to enforce the Board's *Gissel* bargaining order—the Respondent has long since suspended operation of its unlawful employee committee. And, significantly, from its unlawful conduct in 1990 until the Board's Decision and Order, the Respondent is not alleged to have unlawfully discharged unit employees or otherwise to have violated the Act.

Next, almost 9 years have elapsed since the Respondent's unfair labor practices and there is no claim or evidence that this delay was caused by the Respondent. On the contrary, the Respondent promptly filed its motion for reconsideration with the Board after the underlying Decision and Order, and timely filed for review with the circuit court. Thus, there is no evidence that it sought to prolong these proceedings in an effort to dissipate the Union's majority status.

Under all of these circumstances, particularly the Board's long and unjustified delay in processing the case, we recognize that, in light of *Avecor* and *Somerset Welding*, a *Gissel* bargaining order likely would be unenforceable. Rather than engender further litigation and delay over the propriety of a bargaining order, we believe that employee rights would better be served by proceed-

[9] This was the date of the Respondent's affidavit describing employee and managerial turnover since the election. It was information in this affidavit that the Board verified through the Notice to Show Cause.

[10] In all other respects the underlying Decision and Order is affirmed.

[11] Member Hurtgen expresses no view as to whether this position of the Board is legally correct and appropriate.

[12] See fn. 3, supra.

[13] Specifically, the court held that the Board must consider turnover occurring up until the time that a new order issues.

[14] Inasmuch as the turnover as of July 1994 is a factor establishing that a bargaining order is unwarranted, we need not pass on the relevance of further alleged turnover after that date.

[15] See *Camvac International*, 288 NLRB 816 (1988), remanded mem. 877 F.2d 62 (6th Cir. 1989), revd. in relevant part 302 NLRB 652, 653 (1991).

ing directly to a second election. Accordingly, we have modified the underlying Board Order to delete the *Gissel* bargaining provision and we have attached a revised Notice to Employees. We also direct a second election.

Finally, although a *Gissel* remedy is not being imposed, we do find that an additional remedy is warranted in order to dissipate as much as possible any lingering effects of the Respondent's unfair labor practices, and to ensure that a fair election can be held.[16] Specifically, we shall order the Respondent to supply to the Union, on a request made within 1 year of the date of this Supplemental Decision, Order, and Direction of Second Election, the names and addresses of all current unit employees. The Board's delay in acting on the remand which the Board itself requested, although unfortunate, was no more the fault of the union or the employees who were denied a fair opportunity to choose whether they desire union representation than it was of the Respondent. Our Order will afford the Union "an opportunity to participate in [ ] restoration and reassurance of employee rights by engaging in further organizational efforts, if it so chooses, in an atmosphere free of further restraint and coercion." *United Dairy Farmers Cooperative Assn*., 242 NLRB 1026, 1029 (1979), enfd. in relevant part 633 F.2d 1954 (3d Cir. 1980).[17]

ORDER

The National Labor Relations Board orders that the Respondent, Research Federal Credit Union, Detroit, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting grievances from its employees with the implied or express promise that those grievances will be remedied without a union.

(b) Promising and/or granting benefits or improvements, such as the discharge of its chief operating executive, creation of a new teller position, promulgation of a new employee handbook, institution of management training programs for dealing with employees, establishment of benefits for part-time employees, creation of the new position of benefits coordinator, institution of a wage and benefits survey to eliminate inequities and ensure fair wages and benefits for employees, and establishment of a new performance review procedure, or announcing such benefits or improvements in order to discourage its employees from supporting the Union; provided, however, that nothing contained herein shall be construed as authorizing or requiring the Respondent to vary or abandon any benefit previously conferred.

(c) Creating, dominating, supporting, assisting, or interfering with the operation and administration of its employee involvement committee or team or any other labor organization.

(d) Recognizing or in any like or related manner dealing with its employee involvement committee or team or any reorganization or successor thereof, as the collective-bargaining representative of its employees in the following unit:

> All full-time and regular part-time employees employed by the Respondent at its facilities located at 7415 Chicago Road, Warren, Michigan, 180 S. Milford Road, Milford, Michigan, and Suite 103, Fisher Building, 3011 W. Grand Boulevard, Detroit, Michigan; but excluding confidential employees, guards and supervisors as defined in the Act.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw all recognition from its employee involvement committee or team as the representative of its employees in the unit found appropriate for the purpose of dealing with its employee involvement committee or team concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of work and completely disestablish such representative; provided, however, that nothing in this Order shall require the Respondent to vary or abandon any benefits or improvements in working conditions established as a result of its dealing with the employee involvement committee or team, or to prejudice the assertion by its employees of any rights they may have derived as a result of such dealings.

(b) Post at its Warren, Milford, and Detroit, Michigan facilities copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the

[16] It is well settled that the Board has broad discretion when fashioning a "just remedy." *Maramont Corp*., 317 NLRB 1035, 1037 (1995).

[17] The Board has previously ordered this remedy in cases where it found that remedial measures in addition to the traditional remedies for unfair labor practices were appropriate. See, e.g., *Monfort of Colorado*, 298 NLRB 73, 86 (1990), enfd. in relevant part 965 F.2d 1538 (10 th Cir. 1992); *United Dairy Farmers Cooperative Assn*., supra 242 NLRB at 1030; *Haddon House Food Products*, 242 NLRB 1057, 1059 (1979), enfd. in relevant part sub nom. *Teamsters Local 115 v. NLRB*, 640 F.2d 392 (D.C. Cir. 1981); and *Loray Corp.*, 184 NLRB 557, 559 (1970).

This remedy is in addition to the Union's right to have access to a list of voters and their addresses under *Excelsior Underwear*, 156 NLRB 1236 (1966), after issuance of the Notice of Second Election.

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Supply the Union, on request made within 1 year of the date of this Supplemental Decision, Order, and Direction of Second Election, the full names and addresses of its current unit employees.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that Case 7–RC–19248 is reopened and that all prior proceedings held thereunder are reinstated.

IT IS FURTHER ORDERED that Case 7–RC–19248 is severed and remanded to the Regional Director for Region 7 for the purpose of conducting a second election as directed below.

[Direction of Second Election omitted from publication.]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT solicit grievances from our employees with the implied or expressed promise that those grievances will be remedied without a union.

WE WILL NOT promise or grant benefits or improvements, such as the discharge of our chief operating executive, creation of a new teller position, promulgation of a new employee handbook, institution of management training programs for dealing with employees, establishment of benefits for part-time employees, creation of the new position of benefits coordinator, institution of a wage and benefits survey to eliminate inequities and ensure fair wages and benefits or improvements in order to discourage our employees from supporting the Union; provided, however, that nothing contained herein shall be construed as authorizing or requiring us to vary or abandon any benefit previously conferred.

WE WILL NOT dominate, support, assist, or interfere with the operation and administration of our employee involvement committee or any other labor organization.

WE WILL NOT recognize or in like or related manner deal with our employee involvement committee, or any reorganization or successor thereof, as the collective-bargaining representative of our employees in the following bargaining unit:

> All full-time and regular part-time employees employed by us at our facilities located at 7415 Chicago Road, Warren, Michigan, 180 S. Milford Road, Milford, Michigan, and Suite 103, Fisher Building, 3011 W. Grand Boulevard, Detroit, Michigan; but excluding confidential employees, guards, and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL withdraw all recognition from our employee involvement committee as the representative of our employees in the appropriate bargaining unit described above for the purpose of dealing with our employee involvement committee concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of work and completely disestablish our employee involvement committee as such representative; provided, however, that nothing in the Board's Order shall require us to vary or abandon any wages, hours, or other benefits granted as a result of dealing with our employee involvement committee, or to prejudice the assertion by our employees of any rights they derived as a result of such dealings.

WE WILL supply the Union, on request made within 1 year of the date of the Board's Supplemental Decision, Order, and Direction of Second Election, the full names and addresses of its current unit employees.

RESEARCH FEDERAL CREDIT UNION